

Draft EAEA Responses to the Digital Services Act Consultation

Section V - Situation of self-employed individuals providing services through platforms

The draft elements below are for use in a joint (or individual by each Federation) EAEA response to the DSA questions, in particular Section V, as pertains to the Commission's "Process to address the issue of Collective Bargaining for Self-Employed".

Q 33. Please explain the issues that you encounter or perceive [regarding *platform-based* service provision in the sector]

In the Media, Arts and Entertainment sector, delivery of services via online platforms is still not highly prevalent, however, there are some examples. For actors, the delivery of voice-work is increasingly common via online platforms, while in the music sector, session musicians too offer services and are engaged for short session contracts via platforms (examples include platforms such as voices.com or fiverr.com). These forms of platform work raise a number of important issues:

- The voice and session work offered on platforms is via self-employed service contracts meaning performers who take it up will have to establish themselves as self-employed and manage that status and their social security situation etc, while combining with other employment where they may have another status. This can often lead to a patchy social security situation.
- It requires performers to equip themselves to be able to record at home to studio standard. While the evolution of technology has made this possible, it represents an upfront investment and ongoing cost to be borne by the performer and not by the engager.
- The platforms create a massive pool of competition, whether professional performers or amateurs, meaning that engagers hold a lot of power. This exerts downward pressure on prices and devalues the service, making it extremely hard for any individual to determine their own conduct in the market and set a sustainable price.
- With no stake in the cost of the use of recording equipment, there is no incentive for engagers to bundle work, meaning that it may be offered piecemeal as micro engagements which offer very low rates of pay.
- There are practical and legal hurdles that prevent the self-employed performers providing these services via platforms from engaging in any collective negotiation of rates of pay or on other work related issues, effectively depriving them of any access to labour protections in relation to the work performed.
- The engagers using the platforms are not organised in any way into a viable social dialogue partner and the platforms themselves refuse any such role, claiming a purely intermediary role. Thus any form of social dialogue is doubly hampered.

As regards crew in the sector, platforms are also operating in the labour market. Several online platform services (cross-border) provide access to jobs offers and/or hiring of crewmembers in film & TV production. While some services simply provide a platform to link employers and workers, others play a more direct role in the hiring process, like a work agency, and exclusively propose engagement via service contract and self-employed status. All services that we are aware of are paid services and agency-like providers take a fee, a percentage of the invoice paid by the employer.

Agency-like online platform services are effectively gatekeepers and accentuate the pressure on crew members to work as self-employed with similar impacts on rights and conditions as described above.

34. Do you think individuals providing services in the 'offline/traditional' economy face similar issues as individuals offering services through platforms?

Yes

35. Please explain and provide examples

In the Media, Arts and Entertainment sector, many of the issues described apply to sectoral workers in an offline context: a context that is generally characterised by high levels of self-employment and short-term project-based working and a strong culture of freelancing. Performers and cultural workers also may cumulate a range of short engagements or 'gigs' as a normal part of their working lives and despite the high level of skill that they bring to their work, this may make it very difficult to derive a sustainable income from it.

This work is often performed on a self-employed basis. This may be the preferred approach of the employer or, in some cases, there are fiscal incentives that may improve short-term incomes for workers in a predominantly low-wage sector. Digital change has also made distance collaboration and home-working more viable, further driving the trend towards self-employment. The contractual status has little impact on the nature of work itself, however, which, in the case of performers for example, will still often be in a set time and place with no possibility of substitution or similar. It can even lead to situations where, in a given workplace, workers may perform the same task side by side while being engaged with different contractual statuses (examples of this might include: stagehands engaged for a specific production; orchestra substitutes; freelance technicians working for a broadcaster; guest performers on a TV production etc).

It does however significantly impact on the rates of pay for such work. The application of competition rules, designating such self-employed workers as undertakings, means that they are not eligible to be represented by their trade unions in collective bargaining, on the grounds that this would constitute price-fixing. This application of competition rules to established collective bargaining relationships has removed self-employed workers in the sector from the scope of collective bargaining in countries including Ireland, the Netherlands, Sweden, Denmark and the Czech Republic, as the EAEA has reported to the Commission in the framework of its recent process to address collective bargaining for self-employed. In many instances, the competition authority further warned unions not to recommend any minimum rates to members. Thus individuals engaged on a self-employed contract could be engaged at rates below those that unions and employers had previously joint established as a fair minimum, also undermining the rates themselves.

While not all competition authorities in the EU have targeted collective bargaining agreements in the sector which cover self-employed workers, the instances that have arisen have exerted a chill effect on collective bargaining generally. While 'offline' employers do not necessarily share the reluctance of platforms to be designated as employers and engage in collective bargaining, they will not engage where there is doubt regarding the legality of such negotiations.

36. In your view, what are the obstacles for improving the situation of individuals providing services through platforms / in the offline/traditional economy

Through Platforms: the lack of any employer counterpart for standard setting via collective bargaining is a major obstacle to improving conditions. Ensuring that platforms assume responsibility and a real commitment to collective bargaining is vital in this regard. Collective bargaining can also improve the quality and the sustainability of work, delivering social benefit by addressing other issues related to work and working conditions, such as holiday, skills development, access to training etc.

Workers on platforms face significant obstacles to enjoying their fundamental right of freedom of association. The basis on which work is offered to them has led them to designated undertakings rather than workers, thus depriving them of labour rights accorded to workers. The online environment is in itself a significant practical obstacle to organising such workers, but unions are in any case hampered in any such efforts by the legal obstacle of competition rules preventing them from being able to actually represent such workers in collective bargaining.

In the offline economy: self-employed workers in the offline economy in the Media Arts and Entertainment sector share the difficulties described above that arise from the designation that they are undertakings for the purposes of competition law.

Being self-employed may also in some cases deprive them from any enjoyment of their right to freedom of association, where labour codes (such as that in Romania for example) simply do not recognise them as workers, despite the clarity Article 11 of the European Convention of human rights and the fact that ILO Conventions 98, 151 and 154 extend collective bargaining rights to all employers and workers and all subjects and according to the 2012 General Survey the right to collective bargaining should also cover organisations representing self-employed workers (ILO General Survey, para. 209).

Restrictive interpretation of competition rules may also impact on the possibility for unions, who do represent self-employed workers, to collectively bargain on their behalf or even simply recommend minimum rates. This effectively deprives such workers of labour protections that can be achieved through collective bargaining, raising quality of work and incomes from labour. It also weakens unions themselves as they cannot reach out to or represent the whole of the workforce in the sector.

Even where competition authorities have not taken action against sectoral unions at national level, the lack of clarity about what is possible in terms of collective bargaining is in itself an obstacle. Where there is any doubt about the possible legality of such negotiations, it will have a chill effect on them and furthermore, affiliates of the trade union federations of the European Arts and Entertainment Alliance report that employers themselves advance the argument of competition rules to refuse collective bargaining on behalf of self-employed workers, even in the absence of any opinion from the national authority.

Where engaging individuals on a self-employed basis remains an effective way to access cheaper labour, by out-sourcing social security and even equipment costs to such workers, it will remain an attractive option for employers. Collective bargaining can address this by ensuring that the basic minimum cost of the work done/service provided remains equivalent, regardless of employment status. There are examples of collective agreements in the Media Arts and Entertainment sector which achieve this via a chapter addressing rates of pay for self-employed and calculating them at the collectively bargained minimum plus an agreed percentage to cover the additional costs borne by the self-employed person. This safeguards collectively bargained minimums, but also ensures that real costs borne by self-employed workers, such as social security and, in some cases equipment, are actually covered by their rates of pay. Thus it allows employers to retain full access to the freelance workforce but disincentives it on purely cost-based grounds.

37. To what extent could the possibility to negotiate collectively help improve the situation of individuals offering services:

38 Which are the areas you would consider most important for you to enable such collective negotiations?

The issues described in the preceding paragraphs are those that would urgently need to be addressed in order to enable collective negotiations:

- There needs to be clarity regarding the right to freedom of association of self-employed workers and the rights of unions to represent those workers and this should be reflected in labour codes across the EU;
- There needs to be a clear understanding that collective bargaining by unions on behalf of their self-employed workers is collective bargaining and not price fixing and should not fall within the remit of EU competition law. Collective bargaining should never be conditional upon competition rules. Neither workers, nor non-standard or self-employed workers should be considered undertakings for the purpose of competition law. Wage setting does not in any way constitute price fixing. Labour is not a commodity.
- There needs to be a renewed engagement with the recognition of social dialogue and collective bargaining as the best and most adapted tools to regulate labour markets and that a strong and well-functioning social dialogue is to the benefit of all. Promoting it should lie at the heart of efforts and ambitions for a social Europe. The social pillar is based on the aspiration that social justice is the foundation of the European social market economy and at the heart of the European Union. Strong social dialogue that offers protections to workers is a vital component of ensuring decent work and tackling inequality. It must play a key role in promoting social fairness and prosperity as the cornerstones for building the “resilient society with the highest standards of well-being in the world” to which we aspire.

The Commission’s work under the new start for social dialogue needs to continue and industrial relations systems in Europe must be fostered if they are to stay the pace in the rapidly changing world of work. There needs to be a renewed commitment to ensuring that employers engage with collective bargaining, not mobilising all possible resources and arguments in order evade it, whether online or offline.

39. In this regard, do you see any obstacles to such negotiations? (3000)

The restrictive application of competition law to collective bargaining and the fear and the chill effect that this has exerted continues to be a significant obstacle to collective bargaining on behalf of self-employed workers in the Media, Arts and Entertainment sector. There needs to be legal clarity for employers and unions regarding their right to collectively bargain for self-employed workers.

40. Are there other points you would like to raise? (3000)

As mentioned above, ensuring access to freedom of association and collective bargaining for self-employed workers should be a strong part of the EU’s broader commitment to promoting social dialogue and a social vision for Europe. Collective defence of workers’ interest and collective bargaining are intrinsic elements of the social policy chapter of the TFEU, Art. 153 e) and f) thereof.

In its role to 'recognise and promote the role of the social partners at its level, taking into account the diversity of national systems', the Union 'shall facilitate dialogue between the social partners, respecting their autonomy' (Art. 152 TFEU). In this respect, and according to Art. 154 (2) TFEU, 'before submitting proposals in the social policy field, the Commission shall consult management and labour on the possible direction of Union action'. This is the role of DG Employment, Social Affairs and Inclusion and it is vital it continue to take the lead in developing the labour and social policy response needed to address this issue. Close consultation of social partners will be key to achieving this. As European social partners, we are very keen to contribute to this process on behalf of our sector's workforce.

In 2019, the European Union adopted the new Directive on copyright and related rights in the Digital Single Market. The provisions in Chapter III of the directive should empower authors and performers and their unions to step up their fight against buy-out contracts and promote fair standards in the audiovisual industry. The directive references collective bargaining as a mechanism in achieving fair remuneration in exploitation contracts for authors and performers. This opens a significant door for unions in the Media, Arts and Entertainment sector to achieve better return for workers in the sector for online use of their work. Many of these workers are self-employed or combine self-employed with employed activities. It is vital that they should not be denied the possibility of achieving fair and proportionate remuneration for the use of their work in the online environment due to this status.